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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ZOLLO DRUM COMPANY, INC. and
NRS CARTING COMPANY, INC.,

Petitioners,

v.

B.F. GOODRICH; UPJOHN CO.; DOW CORNING CORP.;
HOECHST CELANESE CORP.; REYNOLDS ALUMINUM
BUILDING PRODUCTS CO.; UNIROYAL CHEMICAL CO., INC.;
WHITE CONSOLIDATED INDUSTRIES and
UNITED STATES of AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

AMICUS CURIAE BRIEF OF THE NATIONAL SOLID WASTE MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS ZOLLO DRUM CO., INC. AND NRS CARTING CO., INC.

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Pursuant to Supreme Court Rule 37, the National Solid Waste Management Association ("NSWMA") files this *amicus curiae* brief in support of Petitioners' Writ of Certiorari in the

above-captioned case.[1] The written consents of Petitioners, Respondents and the United States to the filing of this brief have been filed with the Clerk.

INTEREST OF *AMICUS CURIAE*

The NSWMA is a voluntary association consisting of over 800 members nationally, and 115 members within the Second Circuit, all of whom are engaged in the business of providing waste handling, transportation and disposal services to municipal, residential and commercial customers. The NSWMA is especially interested in liability issues, particularly those under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA" or "Superfund"), which affect companies in the waste management business. During the last two decades, as government regulations have become more complex, there has been an unprecedented consolidation of the waste management industry. NSWMA members have acquired the assets of other companies in the solid waste handling, transportation and disposal business, thus increasing the sophistication and efficiency of waste management in this country. Pursuant to the Second Circuit's expansive successor liability ruling, NSWMA members now face significant, unanticipated, unbargained for and expensive, potential CERCLA liability for the prior unrelated actions of the business entities who sold their assets to these individual NSWMA members.

The Second Circuit's ruling is also particularly relevant to NSWMA members because 250 (or 23%) of the sites earmarked for cleanup under CERCLA are landfills that accepted waste from municipal, residential and commercial customers. EPA Proposal for Municipality and MSW Liability Relief at CERCLA Co-Disposal Sites, 62 Fed. Reg. 37231 (1997) (proposed July 11, 1997). In aggregate, the potential

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1. As required by Supreme Court Rule 37.6, the NSWMA states that counsel for the parties did not author this brief in whole or in part and that there are no other persons or entities, other than the NSWMA and its members or counsel, who made a monetary contribution to the preparation or submission of this brief.

liability for NSWMA members at these 250 sites and others, many of which are now pending in litigation, well exceeds one billion dollars. For these reasons, the NSWMA has a direct and concrete interest in this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Second Circuit's ruling determined that evolving federal common law, rather than established state law, governs questions of corporate successor liability under CERCLA. The Second Circuit further decided that as a matter of federal common law, questions of successor liability in asset transfers under CERCLA will be determined pursuant to the expansive "substantial continuity" test, which has been rejected by nearly every state. The NSWMA supports the Petition for Writ of Certiorari on the important issue of successor liability under CERCLA for the following reasons.

First, the Second Circuit's ruling misapplied this Court's controlling precedents, *O'Melveny & Myers v. FDIC,* 512 U.S. 79 (1994) and *United States v. Kimbell Foods, Inc.,* 440 U.S. 715 (1979), which establish a strong presumption against the creation of federal common law. Proper application of the *O'Melveny* and *Kimbell Foods* test demonstrates that a federal common law rule of successor liability under CERCLA is unwarranted because: (1) Congress did not, in CERCLA, direct the courts to create a federal common law rule of successor liability; (2) there is no need for a national uniform rule of successor liability; (3) the traditional state law of successor liability is consistent with, and would not frustrate, CERCLA's policies; and (4) a federal common law rule adopting the discredited "substantial continuity" test would supplant the long-standing state corporate law of successor liability, and disrupt established commercial relationships predicated on that state law.

Second, by misapplying this Court's precedent, the Second Circuit has aggravated an existing conflict among the circuit courts, many of which have held that the issue of successor liability under CERCLA should be determined pursuant to state law. The Second Circuit is also in conflict with the majority of circuit courts that hold that state law, and not fed-

eral common law, applies to CERCLA liability questions affecting state-created business entities, including such closely related questions as the capacity of a dissolved corporation to be sued, the liability of limited partners, the validity of an inter-corporate contractual release of CERCLA liability, and the liability of a parent corporation for the actions of its subsidiary.

Third, by misapplying this Court's precedent and adopting the expansive "substantial continuity" test to determine successor liability under CERCLA, the Second Circuit has retroactively upset the well-settled expectations of businesses made in reliance on state corporate successor law, and created uncertainty in both future commercial transactions and in pending CERCLA litigation involving billions of dollars in potential liabilities.

ARGUMENT

I. THE SECOND CIRCUIT MISAPPLIED THIS COURT'S PRECEDENTS IN ADOPTING A FEDERAL COMMON LAW RULE ON THE IMPORTANT ISSUE OF SUCCESSOR LIABILITY UNDER CERCLA.

A. The Second Circuit Failed to Properly Evaluate CERCLA's Language in Determining that Federal Law Governs Successor Liability Under CERCLA.

In *O'Melveny* and *Kimbell Foods,* this Court reinforced the longstanding presumption against the creation of federal common law. In all but the most extraordinary cases, federal courts should not adopt court-made rules to supplement comprehensive and detailed federal regulatory programs, like CERCLA. Within the federal system, the function of weighing and appraising the various issues concerning the nature and scope of liability to impose on various entities "is more appropriately for those who write the laws, rather than for those who interpret them." *O'Melveny,* 512 U.S. at 89 (quoting *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77, 98 n. 41 (1981) (quoting *United States v. Gilman,* 347 U.S.

507, 512-13 (1954))); *Accord Atherton v. FDIC*, 117 S. Ct. 666, 670 (1997). The threshold inquiry, therefore, is whether, in CERCLA's comprehensive statutory provisions, Congress directed the federal courts to create federal common law to resolve the issue of successor liability.

CERCLA contains only one directive to apply federal law, on an issue entirely unrelated to corporate successorship. Section 113(f) of CERCLA, 42 U.S.C. § 9613(f), permits a liable party to bring a contribution action to recover costs from another liable party. Section 113(f) of CERCLA specifically provides that:

> Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law.

42 U.S.C. § 9613(f)(1) (quoted in full in Petitioners' Appendix ("Pet. App.") at 91a). Accordingly, in the context of contribution actions among parties determined to be liable, Congress "weighed and appraised" the various issues, and unambiguously provided that the procedures to be followed and the method for allocating costs among those liable parties must be determined by federal law.

In stark contrast, CERCLA's detailed regulatory scheme does not direct the federal courts to create federal common law to define the scope of liability arising from business transactions, including liability for alleged corporate successors. Congress demonstrated its ability to direct that federal common law be used in resolving the procedures for contribution actions under section 113(f). Thus, under *O'Melveny*, Congress must have intended for state law to apply to other issues for which it did not so direct the federal courts, including the issue of corporate successor liability. For this reason alone, it was improper for the Second Circuit to create a federal common law rule of successor liability under CERCLA.

B. The Second Circuit Misapplied the *Kimbell Foods* Test in Determining that Federal Law Governs Successor Liability Under CERCLA.

In the absence of an express Congressional directive, there is a strong presumption against the creation of federal

common law that displaces state law. This presumption can be rebutted only in extraordinary cases after satisfying the following three-part test: (1) whether there is a need for a national uniform body of law; (2) whether application of state law would frustrate the specific objectives of the federal program in question; and (3) whether the application of a federal common law rule would disrupt commercial relationships predicated on state law. *Kimbell Foods,* 440 U.S. at 728-29.

This Court has been especially reluctant to create federal common law rules that preempt well-established rules of state corporate law. In *Kamen v. Kemper Fin. Servs., Inc.,* 500 U.S. 90 (1991), this Court reiterated that the presumption against creating federal common law

> is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state law standards. Corporation law is one such area.

Id. at 98 (citations omitted). *See also Burks v. Lasker,* 441 U.S. 471, 478 (1979) ("Congress has never indicated that the entire corpus of state corporate law is to be replaced simply because a plaintiff's cause of action is based on a federal statute.").

Corporations are creatures of state law, wholly dependent on state law for their existence, rights, powers and liabilities. Accordingly, only in the most extraordinary circumstances should a federal court create a federal common law rule, such as a rule of successor liability, that would preempt state corporate law. *See Anspec Co., Inc. v. Johnson Controls, Inc.,* 922 F.2d 1240, 1245 (6th Cir. 1991). In light of this strong presumption, the Second Circuit misapplied the three-part *Kimbell Foods* test in determining that federal law governs successor liability under CERCLA.

1. There is no need for a national uniform federal common law rule of successor liability under CERCLA.

The Second Circuit provided as its primary rationale for creating an expansive federal common law rule of successor liability under CERCLA that:

> a number of courts have recognized the importance of national uniformity and applied traditional rules of successor liability, rather than the successor liability of a given state.

Opinion of Nov. 1, 1996 ("Opinion"), reproduced in Pet. App. at 20a-21a (citations omitted). The Second Circuit's reliance on the argument that there is a need for a national uniform rule, viewed as the most generic and insignificant federal interest, *O'Melveny*, 512 U.S. at 88, ignores the virtual uniformity of the successor liability doctrine under existing state law. Indeed, the Sixth Circuit in *Anspec* stated that the United States, the party charged with enforcing CERCLA, has acknowledged that "the law in the fifty states on corporate dissolution and successor liability is largely uniform." *Anspec*, 922 F.2d at 1249 (Kennedy, J., concurrence). *Accord Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501 (11th Cir. 1996). The only area of potential non-uniformity in state law arises from a more expansive rule of successor liability, known as the "substantial continuity" test, adopted by fewer than ten states, and applied exclusively in the products liability context. *See City Management Corp. v. U.S. Chem. Co., Inc.*, 43 F.3d 244, 252 (6th Cir. 1994); *Grand Labs., Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277, 1283 (8th Cir. 1994); *Turner v. Bituminous Casualty Co.*, 244 N.W.2d 873, 877 (Mich. 1976).

Any concern that states in the future will alter their successor liability rules to relieve corporations of CERCLA liability is also unfounded. As Circuit Court Judge Kennedy stated in her concurring opinion in *Anspec*:

> Any fears that states will engage in a "race to the bottom" in their effort to attract corporate business and enact laws that limit vicarious liability are in my opinion groundless. States have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and EPA and they share a complementary interest with the United States in enforcement of laws like CERCLA that are used to remedy environmental contamination. I see no necessity to cre-

> ate federal common law in this area to guard against the risk that states will create safe havens for polluters.

922 F.2d at 1250 (Kennedy, J., concurrence). In short, the purported need for national uniformity is illusory given the near uniformity of existing state law.

2. Application of the state law of successor liability would not frustrate the policies of CERCLA.

The Second Circuit correctly articulated the two primary purposes of CERCLA. The first policy ensures "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the cost of their actions." Opinion, Pet. App. at 9a (citations omitted). This is known as the "polluter pays" policy. Second, CERCLA aims to facilitate efficient and prompt responses to environmental harm. *Id.* at 10a. Contrary to the Second Circuit's conclusions, use of state law to determine successor liability would facilitate, not frustrate, these CERCLA policies.

A fundamental difference between traditional state law successor liability and the federal common law approach adopted by the Second Circuit is that state law requires the purchasing corporation to have some responsibility for or nexus to the prior actions of the selling corporation for the purchaser to be found liable. State law under the traditional "mere continuation" and "de facto" merger tests ensures this nexus by requiring that the purchasing corporation have common management, officers, directors and stockholders with the selling corporation — *i.e.*, the purchaser is the same corporation in a new corporate form. *Grand Labs.*, 32 F.3d at 1282-83; *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439 (7th Cir. 1977). The selling and purchasing corporations are not wholly distinct, and the purchaser is held liable not for the acts of another entity, but for its own acts during a prior corporate life. Therefore, state successor liability rules facilitate CERCLA policies by ensuring that the entity responsible for the harm pays for the harm. Indeed, the Second Circuit apparently endorses this rule by stating that successor liability is meant to prevent a predecessor from benefitting

> from the illegal disposal of hazardous substances and later evad[ing] responsibility for remediation simply by changing the form in which it does business, thereby subverting the Act's purpose of holding responsible parties liable for cleanup costs.

Opinion, Pet. App. at 20a.

In contrast, the expansive "substantial continuity" test adopted by the Second Circuit merely requires continuity of business operations between buyer and seller, as opposed to a continuity of the business entity itself. *Mozingo v. Correct Mfg., Corp.*, 752 F.2d 168, 175 (5th Cir. 1985); *Cyr v. B. Offen & Co., Inc.*, 501 F.2d 1145 (1st Cir. 1974); *Turner*, 244 N.W.2d 873. For these reasons, the majority of state courts routinely reject the "substantial continuity" test as an unwarranted extension of the successor liability doctrine. *See Polius v. Clark Equip. Co.*, 802 F.2d 75, 82 (3d Cir. 1986); *Sylvester Bros. Dev. Co. v. Burlington N. R.R.*, 772 F.Supp. 443, 449 (D. Minn. 1990); 15 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7123.06 (perm. ed. 1996). A purchaser who continues to operate a similar business as the seller could be held liable under the "substantial continuity" test even when the purchaser's ownership and management had no involvement with or responsibility for the prior actions of the seller that caused the environmental harm. This result contravenes the "polluter pays" policy by imposing liability on a corporation not responsible for any injury to the environment. As one commentator stated,

> as between an entirely innocent successor and the Superfund, paid for in the main by the oil, petrochemical, and other industry, it seems more equitable and consistent with the purpose of making the "polluters" pay to have the congressionally designated class of polluters pay, rather than someone unrelated to the risk.

Alfred R. Light, *Product Line and Continuity of Enterprise Theories of Corporate Successor Liability under CERCLA*, 11 MISS. C.L. REV. 63, 78 (1990).

The Second Circuit also failed to demonstrate how imposition of successor liability under the "substantial continuity" test promotes CERCLA's goal of prompt cleanup of environmental harm. To the contrary, the fact-dependent, totality of circumstances "substantial continuity" approach created by the Second Circuit is more likely to result in vigorous, time-consuming litigation on these issues, which will delay rather than expedite remediation. State law, on the other hand, imposes more certain and settled liability principles under the "mere continuation" or "de facto merger" tests, which focus on salient criteria such as stock ownership and management. [2]

3. Application of a federal common law rule of successor liability under CERCLA would disrupt commercial relationships predicated on existing state law.

The purpose of the general rule of non-liability in asset transfers is to promote predictability in corporate transactions and free alienability and transferability of property. *Polius*, 802 F.2d at 83. In particular, "[p]redictability is vital in the corporate field. . . . Major economic decisions, critical to society, are best made in the climate of relative certainty and reasonable predictability." *Id.* Free alienability of property is an equally important policy underpinning state successor liability

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2. The Second Circuit's primary rationale for adopting the discredited "substantial continuity" test was because "[t]he Supreme Court has followed this approach in the labor law context . . . ." Opinion, Pet. App. at 21a (citing *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987)). The rationale for the successor liability rule adopted in *Fall River* is inapplicable to CERCLA for two primary reasons. First, a successor liability test, such as "substantial continuity," which focuses on retention of employees and management is perfectly appropriate under the National Labor Relations Act, where the primary purpose is to protect employee expectations. In contrast, mechanically imposing a "substantial continuity" test under CERCLA constitutes a retroactive abrogation of fixed business arrangements that would disrupt, rather than protect, settled expectations. Second, *Fall River* merely imposes a duty on the employer to bargain with the predecessor union; it does not impose a duty to honor existing union contracts, let alone an unknown, contingent monetary liability on a purchasing corporation. "Substantial continuity" under CERCLA, by contrast, would impose direct monetary liability, of an unknown amount, on an asset purchaser.

law. To this end, the general rule of non-liability under state law encourages desirable commercial transactions by reducing the buyer's risk of loss and uncertainty concerning the value of the assets purchased, making buyers and sellers more willing to enter into the asset transaction.

At the same time, traditional state corporate law recognizes the need to protect creditors from corporate transactions designed to avoid liability. For this reason, state successor liability doctrine strikes an appropriate balance between these competing policies by reinforcing the general rule of non-liability in asset transactions and at the same time creating narrow exceptions to this general rule where there is a need to prevent a creditor from unjustly being left with no recourse. For decades, NSWMA members and other asset purchasers have engaged in asset acquisitions in reliance on this settled, developed, easily discovered and applied traditional rule of non-liability in asset transfers. Indeed, the price paid by the buyers to the sellers in these transactions reflected the parties' understanding of who would be responsible for the sellers' liabilities.

In contrast, the Second Circuit's creation of an expansive new rule of successor liability under CERCLA using the "substantial continuity" test, which will be imposed retroactively on transactions completed decades ago, undeniably disrupts these prior commercial relationships predicated on established state law. For example, an expansive rule of successor liability violates the recognized policy that there is a need for certainty in transactions because it increases the purchaser's risk of unanticipated liabilities. "The imposition of successor liability on a purchasing company long after the transfer of assets defeats the legitimate expectations the parties held during negotiation and sale." *Polius,* 802 F.2d at 83. CERCLA liability creates particular uncertainty because of contingencies regarding the extent and cost of cleanup, the allocation of liability among responsible parties, and the presence of potential "orphan shares" attributable to insolvent and defunct entities. In short, the Second Circuit's adoption of an expansive federal rule of successor liability will displace and negate

decades of well-established state law on successor liability, on which businesses properly have long relied.

II. THE SECOND CIRCUIT'S MISAPPLICATION OF THIS COURT'S PRECEDENT IN ADOPTING A FEDERAL COMMON LAW RULE OF SUCCESSOR LIABILITY UNDER CERCLA HAS CREATED A SQUARE CONFLICT AMONG THE COURTS OF APPEALS.

In choosing to create a federal common law of successor liability under CERCLA, the Second Circuit also created a square conflict among the courts of appeals on the issue of successor liability and on a variety of closely-related CERCLA liability issues regarding state-created business entities. Although the Second Circuit's creation of a federal common law of successor liability under CERCLA is consistent with the opinions of three other courts of appeals,[3] it conflicts with the decisions in the First and Sixth Circuits. *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 408-09 (1st Cir. 1993); *Anspec*, 922 F.2d 1240; *City Management*, 43 F.3d at 250. This split among the circuit courts persists even after *O'Melveny* due to the Second Circuit's opinion and other opinions discussed below.

The Second Circuit ruling also creates a square conflict with the decisions of the courts of appeals on four closely-related CERCLA liability issues concerning corporate law. First, on the threshold issue of whether a business entity is legally cognizable and subject to CERCLA claims, the courts of appeals have consistently relied on state law. In particular, the Seventh, Eighth and Ninth Circuits applied state corporate law to determine the capacity of a dissolved corporation to be sued under CERCLA. *Citizens Elec. Corp. v. Bituminous Fire*

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3. *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1263 (9th Cir. 1990); *Smithland & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989). The Ninth Circuit recently heard oral argument on whether *Louisiana Pacific* is still good law after *O'Melveny*. *Atchison, T. & S.F. Ry. Co. v. Brown & Bryant, Inc.*, No. 96-15524 (9th Cir. argued May 8, 1997).

& Marine Ins. Co., 68 F.3d 1016, 1019-20 (7th Cir. 1995); *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1451 (9th Cir. 1987); *United States v. Northeastern Pharmaceutical & Chem. Co., Inc.*, 810 F.2d 726, 746 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). In light of these opinions, the Second Circuit's ruling creates the anomaly that state law determines whether a corporation has the capacity to be sued in the first instance, but federal common law is determinative on the issue of successor liability. By way of example, state law applies to situations where a CERCLA claim is made against a company that dissolved, but has not transferred its assets, while federal common law applies where a claim is made against a company that transfers its assets before dissolving.

Second, the Eleventh Circuit applied state law rather than federal common law to determine the analogous issue whether limited partners are liable for the acts of a limited partnership under CERCLA. *Redwing*, 94 F.3d at 1501-02. In *Redwing*, a case decided after *O'Melveny*, the Eleventh Circuit applied the *Kimbell Foods* test and held that, given the popularity of the limited partnership structure as a means of organizing businesses, "we hesitate to upset the expectations investors have under current state law rules by adopting a federal common law rule." *Redwing* 94 F.3d at 1502. The exact same concerns militate against the Second Circuit's creation of a federal common law rule of successor liability under CERCLA, which would eviscerate the expectations of investors in perhaps the most common business transaction in this country — asset acquisitions and divestitures.

Third, courts of appeals have consistently relied upon state law to determine the validity and interpretation of contractual releases and indemnifications of CERCLA liability contained in contracts between potentially responsible parties. *Beazer East, Inc. v. Mead Corp.*, 34 F.3d 206, 212 (3d Cir. 1994), *cert. denied*, 514 U.S. 1065 (1995); *Olin Corp. v. Consolidated Aluminum Corp.*, 5 F.3d 10, 15 (2d Cir. 1993); *John S. Boyd Co.*, 992 F.2d at 406; *United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1457-60 (9th Cir. 1986). Since the corporate successor liability issue, like the contractual release issue,

frequently arises from contractual negotiations over the sale of assets between private parties, the case for applying state law to successor liability issues is as strong as for applying state law to interpret release and indemnification provisions.

Fourth, the Second Circuit ruling threatens to aggravate an existing conflict among the courts of appeals on whether to create a federal common law rule of liability for a parent corporation as the result of the actions of its subsidiary. The Fifth and Sixth Circuits have refused to expand the liability of parent corporations under CERCLA beyond that imposed under existing, well-established, state law governing the piercing of corporate veils. *United States v. Cordova Chem. Co.*, 113 F.3d 572, 576-80 (6th Cir. 1997) (en banc) (cert. petition filed Aug. 8, 1997); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990), *cert. denied*, 498 U.S. 1108 (1991).[4] Since the issue of parent/subsidiary liability has traditionally been determined by state corporate law, the Second Circuit's ruling creates further uncertainty whether federal common law will displace these longstanding state corporate law principles.

III. THE SECOND CIRCUIT'S MISAPPLICATION OF THIS COURT'S PRECEDENT IN ADOPTING A FEDERAL COMMON LAW RULE OF SUCCESSOR LIABILITY UNDER CERCLA HAS CREATED UNACCEPTABLE UNCERTAINTY IN PAST AND FUTURE COMMERCIAL TRANSACTIONS AND IN PENDING LITIGATION.

The Second Circuit's ruling creates enormous uncertainty in both past and present commercial transactions and in pending litigation. Asset acquisitions and divestitures are among the most common commercial transactions. For decades prior to the enactment of CERCLA, NSWMA members and other parties to countless legitimate asset transfers predicated these transactions on the well-settled, traditional state corporate law

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4. *But see Schiavone v. Pearce*, 79 F.3d 248, 254 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

rule of non-liability in asset transfers, subject only to very limited, universally known, exceptions. Because CERCLA itself imposes retroactive liability for activities that took place well before its enactment, the Second Circuit's adoption of an expansive federal common law rule of successor liability under CERCLA will unfairly deprive these very commercial actors of their justified reliance on these traditional state corporate law doctrines. The Second Circuit's desire to increase the number of responsible parties under CERCLA to defray remediation costs simply does not justify eschewing these traditional state corporate law doctrines.

The Second Circuit's ruling also wreaks havoc on the ability of businesses to structure future commercial transactions. As stated *infra*, the states' successor liability doctrine was carefully crafted over decades, and is now virtually uniform. For this reason, commercial actors structured their business transactions against this settled state common law backdrop. In direct contrast, state courts have discredited the expansive federal common law rule of "substantial continuity" under CERCLA endorsed by the Second Circuit. Moreover, those federal courts that have adopted the "substantial continuity" test have applied it inconsistently. Profound disagreements about the content of the federal common law of CERCLA successor liability exists, and the lower courts directly contradict each other on threshold issues regarding the scope and predicates for successor liability under the "substantial continuity" test. Petition for Writ of Certiorari at 15-18 (discussing cases). Using state successor liability doctrine as a guide, it will be decades before there is a coherent and consistent body of federal common law of successor liability under CERCLA. Accordingly, commercial actors attempting to structure business transactions in the future cannot know what the federal common law in a particular court will require and how it may differ from state corporate law that will continue to govern all other aspects of the proposed transaction. The end result is that commercial transactions will either be made without the ability to accurately assess potential future liability, or in many cases, will be avoided.

Assuming, *arguendo,* that a consistent federal common law rule of successor liability endorsing "substantial continuity" is developed, this expansive rule of successor liability will in and of itself have a chilling affect on asset transfers. A rational prospective purchaser will be reluctant to acquire the assets of a business because, as stated above, it will be extremely difficult to predict or project with any degree of accuracy the contingent liabilities of the seller at all locations where it has ever in the past disposed of, treated or used hazardous substances in any phase of its operations. Quite often these contingent liabilities will exceed or even dwarf the value of the purchased assets, thus rendering the assets worthless, and making purchasers unwilling to consummate the transaction. Similarly, under an expansive successor liability rule, a company that desires to cease its operations and sell its assets will have a difficult time locating a single buyer for all of its assets at a favorable price. Instead, the selling company will be forced to sell its assets piecemeal at a less advantageous price. *Polius,* 802 F.2d at 83. The net result is that assets will not be sold or purchased at their true value, and "the benefits of alienability will be lost to commerce . . . ." *Id.* Asset purchasers will also be unwilling to acquire a fully integrated business unit from a seller for fear of being saddled with successor liability. Instead, valuable assets will be left to whither on the vine, with a net loss to the seller who is unable to realize the full value of its business unit in a sale. This in turn will result in an economic loss to society.

Finally, the issue of successor liability arises in the vast majority of pending CERCLA cases as a result of the ubiquity of asset transfers and CERCLA's retroactive reach. Billions of dollars of remedial costs are at stake in these cases. Unless the Second Circuit is overturned, the shadow of the Second Circuit's expansive liability opinion will, at a minimum, require extensive additional litigation and transaction costs regarding this fact-dependent inquiry, and may improperly and finally determine many of these successor liability issues.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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